

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN WEXLER	:	CIVIL ACTION
	:	
v.	:	
	:	
S.C. JOHNSON & SON, INC.,	:	
et al.	:	NO. 97-7315

MEMORANDUM ORDER

Presently before the court is plaintiff's motion to proceed in forma pauperis in this diversity case. As plaintiff states that he receives monthly income of \$925 and has monthly expenses of \$800, the court will assume that he is not reasonably able to pay the usual filing fee.¹

Plaintiff alleges that to eradicate roaches in his apartment he purchased a can of RAID, manufactured by defendant Johnson. He alleges that when he sprayed roaches on a wall, the white wall turned "grayish." Plaintiff states that when he complained, an employee of defendant agreed to pay to repaint the discolored wall. Plaintiff states that he rejected this offer because his painter could not exactly match the color of the undamaged walls and refused to paint only one wall. Plaintiff sought \$1,269 to repaint his entire apartment. Another employee of defendant refused and told plaintiff he would be paid only the cost of repainting the damaged wall.

¹ But see Anderson v. Oscar Mayer Foods corp., 1994 WL 374281, *1 (N.D. Ill. July 12, 1994) (plaintiff with monthly income of almost \$1000 must pay filing fee); Matter of Anderson, 130 B.R. 497, 500 (W.D. Mich. 1991) (litigant with monthly income of \$884 and monthly expenses of \$833 must pay filing fee).

Plaintiff complains that defendant caused him aggravation and emotional distress by its bad faith refusal amicably to settle his claim.² Plaintiff seeks unspecified compensatory damages and punitive damages of \$150,000.

There is a critical difference between asking for an amount in damages and pleading factual allegations from which it reasonably appears that damages in the amount sought could conceivably be awarded. Even assuming that punitive damages might be available in this case, they would have to approximate sixty times actual damages to satisfy the prerequisite for federal diversity jurisdiction. See 28 U.S.C. § 1332(a).³

Plaintiff acknowledges that he received a bid to repaint all of his walls for \$1,269. Plaintiff may have a breach of warranty or defective product liability claim against the manufacturer or distributor of the insecticide that discolored his wall, but such claim must be filed in a state court. It appears to a legal, and literal, certainty that plaintiff cannot recover in excess of \$75,000 on the facts as alleged in his

² Plaintiff uses "et al." in the caption of his complaint but does not specify any defendant other than S.C. Johnson. It appears that he may also be attempting to sue the employee of the named corporate defendant who refused to authorize the \$1,269 payment.

³ A consumer may assert a tort claim for damage caused by a defective product to property other than the product itself. See 2-J Corporation v. Tice, 126 F.3d 539, 543 (3d Cir. 1997). Plaintiff, however, has not alleged the type of egregious conduct required to sustain an award of punitive damages. See Restatement (Second) of Torts § 908(2); Feld v. Merriam, 485 A.2d 742, 747-48 (Pa. 1984).

complaint. See Packard v. Provident Nat'l. Bank, 994 F.2d 1039, 1046 (3d Cir.), cert. denied, 510 U.S. 964 (1993); Kahal v. J.W. Wilson & Associates, Inc., 673 F.2d 547, 549 (D.C. Cir. 1982); Zahn v. International Paper Co., 469 F.2d 1033, 1034 n.1 (2d Cir. 1972), aff'd, 414 U.S. 291 (1973).

ACCORDINGLY, this day of January, 1998, **IT IS**
HEREBY ORDERED that plaintiff's motion to proceed in forma
pauperis is **GRANTED** and the above action is **DISMISSED** for lack of
subject matter jurisdiction, without prejudice to plaintiff to
assert his claim in an appropriate state court.

BY THE COURT:

JAY C. WALDMAN, J.